with the damages awarded under section 7 of the Ordinance.

Accordingly there will be judgment for the plaintiffs for special damages of $595 and general damages of $9,240 and costs.

The general damages of $9,240 are to be divided as to $4,440 to the widow Maimunah binti Abdullah and as to the balance $600 to be paid to each of the 8 children. The shares of the children are to be paid into the post office savings bank in the name of the Senior Assistant Registrar, Supreme Court, Penang, as trustee.

Order accordingly.

Solicitors: *Triptipal Singh*; *Singh & Co.*; *Jayadeva & Zahir.*

CHEONG KEE TECK v. QUAH HOAY KWAN & ORS.

[O.C.J. (Suffian J.) September 23, 1963]

[Alor Star — Kedah Civil Suit No. 102 of 1962]

Land Law — Plaintiff acquiring estate under agreement of sale — Entering into possession — Fragmentation of estate — Contract for sale to 3rd party — Completion in 6 months — 3rd party contracting with 1st and 2nd defendants for sale to latter — 1st and 2nd defendants paying considerable sums to 3rd party — Entering into possession — 3rd party absconding — Rights of 1st and 2nd defendants as against the plaintiff.

Trespass — Kedah Land Enactment (No. 56), s. 78 — Whether registered proprietor a necessary party — Right of person in possession to sue for trespass under system of registration of title — Misrepresentation — Whether fraudulent — Whether acted upon.

Licence — Agreement entitling 3rd party to tap rubber on monthly payment of a sum — Whether terminable.

The plaintiff purchased the Tupah Estate in Kedah and entered into possession on August 30, 1961. The bulk of the estate was transferred to him as proprietor but there remained a small area in respect of which the transfer was not registered.

One P.C. contracted with the plaintiff to purchase the estate for $1,150,000 and paid a deposit of $25,000. Completion was to take place within six months. Under a second agreement P.C. was given the rights to tap rubber on the estate at a monthly payment of $9,000. The 1st and 2nd defendants contracted with P.C. to purchase portions of the estate and against the advice of their solicitor paid considerable sums under the contracts of sale to P.C. who undertook to effect transfers into their names on payment by them of the full purchase prices. P.C. also allowed them into occupation of the estate under his rights flowing from the second agreement to tap rubber. Subsequently, P.C. failed to make the monthly payment of $9,000 and the plaintiff terminated his right to tap. The 1st and 2nd defendants were, however, the persons actually carrying out the tapping and they continued to do so.

P.C. failed to complete the contract of sale with the plaintiff. In fact, he absconded to India. The plaintiff forfeited the deposit and rescinded the contract of sale with P.C. under the provisions thereof, and he then brought an action against the defendants for an injunction and damages for trespass. The 1st and 2nd defendants counterclaimed for damages for fraudulent misrepresentation. Their allegation was that the plaintiff had represented to them that he had sold the estate to P.C. and had authorised P.C. to sub-divide the estate and sell it and that they were to deal with P.C.; that they had acted on this misrepresentation which they claimed was fraudulent.

Held: (1) the representation of the plaintiff to the 1st and 2nd defendants was to the effect that he had sold the estate to P.C. and was therefore not false;

(2) even assuming it was a fraudulent misrepresentation there was ample evidence to indicate that the defendants did not enter into contracts with P.C. on the strength of it;

(3) the first and second defendants were in occupation under a derivative right flowing from the second agreement between the plaintiff and P.C. The right was a licence to tap and as such was properly terminated by the plaintiff;

(4) as from the date of termination of the licence, the 1st and 2nd defendants were trespassers. In respect of that portion of the estate which was registered in the plaintiff's name, they were trespassers in virtue of his rights of proprietorship as well as his rights of possession; in respect of that area which was still not registered in his name, they were trespassers in virtue of his rights of possession;

(5) trespass is an injury to a possessory right; to maintain an action of trespass it is not necessary to be a registered proprietor; plaintiff could maintain an action of trespass if he is the person in possession at the time of the trespass.

Case referred to:—

(1) *Bradford Building Society* v. *Borders* [1941] 2 All E.R. 205.

The following cases were *inter alia* cited in argument: *Wuta-Ofei* v. *Danquah* [1961] 2 All E.R. 596, P.C. at p. 600. *Canvey Island Commissioners* v. *Preedy* [1922] 1 Ch. 179 at p. 199. *Lows* v. *Telford* (1876), 1 App. Cas. 414, H.L. at p. 426. *The Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* [1905] 2 K.B. 493 at p. 497-9. *Nicholls* v. *Ely Beet Sugar Factory* [1931] 2 Ch. 84 at p. 86. *Bristow* v. *Cormican* (1878), 3 App. Cas. 641 at p. 656-7. *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685 at p. 697. *Lawrence* v. *Lord Norreys* (1890), 15 App. Cas. 210 at p. 221. *Davy* v. *Garrett* (1877), 7 Ch. D. 473 at p. 489. *Bharat Dharma Syndicate Ltd.* v. *Harish Chandra* A.I.R. 1937 P.C. 146. *Staffordshire Financial Co.* v. *Hill* (1909), 53 S.J. 446, H.L. *Derry* v. *Peek* (1889), 14 App. Cas. 337 esp. at p. 374 *per* Lord Herschell. *Le Lievre* v. *Gould* [1893] 1 Q.B. 491 at p. 498 *per* Lord Esher. *Central Bank of India Ltd.* v. *Guardian Assurance Co. Ltd.* A.I.R. 1936 P.C. 179. *A. L. N. Narayanan Chettiar* v. *Official Assignee, High Court, Rangoon* A.I.R. 1941 P.C. *Hansraj Gupta* v. *Dehra Dun-Mussoori Electric Tramway Co. Ltd.* A.I.R. 1940 P.C. 98. *Malayan Tobacco Distributors Ltd.* v. *United Kingdom Tobacco Ltd.* [1937] M.L.J. 148, P.C. *The London Chartered Bank of Australia* v. *Lempriere* (1873), L.R. 4 P.C. 572 at p. 597. *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685 at p. 705. *Gordon Hill Trust Ltd.* v. *Segall* [1941] 2 All E.R. 379, C.A. at p. 391. *Bainbridge* v. *Brown* (1881), 18 Ch. D. 188 esp. at p. 198. *Butwick* v. *Grant* [1924] 2 K.B. 483. *Lee Beng Choon* v. *Tan Ngiap Kee* [1962] M.L.J. 315 at p. 317. *Annie Yeo* v. *Senanayake* [1963] M.L.J. 43. *Nocton* v. *Lord Ashburton* [1914] A.C. 932 at p. 951, H.L.

SUIT.

Eusoffe Abdoolcader (*Chong Kah Keng* with him) for the plaintiff.

R. H. V. Rintoul (*A. Jayadeva* with him) for the defendants.

Cur. Adv. Vult.

Suffian J.: The first question I have to decide is whether or not the plaintiff practised fraud on the first and second defendants, as the latter allege. The second question I have to decide is whether or not the three defendants have committed trespass against the plaintiff, as the plaintiff alleges.

As to fraud, only the first and second defendants allege that the plaintiff has practised it on them. The third defendant in the course of the hearing abandons this allegation.

The property, the subject of this dispute, forms part of Tupah Estate. Originally the plaintiff's brother, P.W.6, owned the estate. He sold it to Gooi Bros. (see their agreement of sale dated 22nd July, 1956 exhibit "A" page 4). Gooi Bros. sold it to Tan Thean Tow, P.W.5, for $700,000 and on 28th July 1961, they entered into the agreement of sale (exhibit P - 1) under which Tan Thean Tow paid a deposit of $70,000 and agreed to pay the balance ($630,000) within a month. Tan Thean Tow arranged to sell it to Periathamby Chettiar for $1,150,000 and accepted a deposit of $25,000 from him, Periathamby Chettiar promising to pay him the balance within six months. Tan Thean Tow could not raise the money to pay Gooi Bros. by the promised month because in the meanwhile his financier had been arrested by the Indonesian authorities. So Tan Thean Tow passed the benefit of his arrangement with Gooi Bros. and Periathamby Chettiar to the plaintiff. The plaintiff paid Gooi Bros. the balance due ($630,000), paid Tan Thean Tow $70,000, Tan Thean Tow paid the plaintiff the $25,000 he had received from Periathamby Chettiar.

On 30th August, 1961, the plaintiff went into possession of the estate.

The plaintiff agreed to sell the estate to Periathamby Chettiar for $1,150,000 and on 2nd September, 1961, they entered into the agreement of sale (exhibit "A" page 7) in which the deposit paid by Periathamby Chettiar was expressed to be $25,000, completion to be within 6 months. On 23rd September, 1961, they entered into another agreement (exhibit P - 3) with the object of, in the words of one of its recital, "further clarifying paragraph 4 of" [the agreement of 2nd September, 1961.].

In the meanwhile the first and second defendants had on 14th September, 1961, bought portions of the estate. They say that in that month (September), being interested in buying portions of the estate, they had on the 9th gone to the estate and once again on the 12th, on each occasion they had met the plaintiff who told them that he had authorised Periathamby Chettiar to subdivide and sell it and that they were to deal with Periathamby Chettiar, whereupon they dealt with Periathamby Chettiar.

On 14th September, 1961 the first defendant entered into an agreement of sale (exhibit D - 17) with Periathamby Chettiar agreeing to buy a specified portion of the estate with some buildings and movables for $341,500. He says that he was put into possession of his portion by Periathamby Chettiar, he paid Periathamby Chettiar various substantial sums on various dates, leaving only a balance of $100,000 which he is still ready and willing to pay if he could get title. He says that he would not have dealt with Periathamby Chettiar but for the plaintiff's representation.

As regards the second defendant, he says that he was in the company of the first defendant when on the 9th and again on the 12th the plaintiff addressed the same representation to him, he acted on it, dealt with Periathamby Chettiar thinking he was the plaintiff's agent, on 14th September, 1961, he entered into an agreement of sale (exhibit D - 20) with Periathamby Chettiar agreeing to buy a specified portion of the estate for $99,250 and on 2nd December, 1961, he entered into another agreement of sale (exhibit D - 21) with Periathamby Chettiar agreeing to buy another specified portion for $57,500 and on various dates he had paid Periathamby Chettiar the full amount and he would not have done so but for the plaintiff's representation.

It should be apparent by now that Periathamby Chettiar failed to complete his agreement with the plaintiff and consequently the first and second defendants failed to get title but they hung on to their respective portions whereupon the plaintiff brought this action claiming that all the three defendants are trespassers. Fraud is relevant only because the first and second defendants say that the plaintiff has practised it on them and they counterclaim for damages for fraud.

What happened was this, Periathamby Chettiar failed to pay the plaintiff the balance due under his agreement (exhibit "A" page 7) within the stipulated six months. Time being of the essence, on 3rd March, 1962, the plaintiff instructed his solicitors to send Periathamby Chettiar the notice (exhibit "A" page 43) forfeiting the deposit and rescinding the agreement. But the plaintiff did not immediately after that interfere with the defendants' occupation of their respective portions of the estate under their

agreements with Periathamby Chettiar. Presumably this was because Periathamby Chettiar was coming to some further arrangements with the plaintiff. These further arrangements culminated with the execution by them of two agreements dated 7th March, 1962, (exhibits P - 5 and P - 6), whereunder Periathamby Chettiar agreed to buy not the whole estate but a smaller portion for the price of $725,000, he put down a deposit of $72,500 and agreed to pay the balance on or before 3rd September, 1962.

It should be explained that under the first agreement of sale dated 1st September, 1961, as "clarified" by the supplementary agreement of 23rd September, 1961, and under the second agreement of sale, dated 7th March, 1962, pending completion Periathamby Chettiar was given the right to enter and tap the rubber on payment to the plaintiff of $9,000 a month. Periathamby Chettiar did exercise this right and did pay the agreed fee until his cheque for $9,000 (exhibit "A" page 49) which he had given to the plaintiff in June 1962 bounced, whereupon the plaintiff instructed his solicitors to send Periathamby Chettiar a notice dated 7th July, 1962, (exhibit "A" page 52) terminating the tapping licence P - 6.

On 8th July, 1962, the plaintiff gave notice to people on the estate to stop tapping immediately and to leave the estate on or before 10th July, 1962. They did not. He ascertained that the three defendants were behind the tapping and three days later he instructed his solicitors to send them the written notice (exhibit "A" page 53) asking them to stop tapping and to leave the estate forthwith and saying that after 11th July, 1962, they had no authority to remain on the estate and they and their servants and agents should have vacated it on or before 10th July, 1962.

The third defendant had come into the picture in this way. After Periathamby Chettiar had executed the second agreement of sale dated 7th March, 1962, with the plaintiff, the second defendant sold 36 relongs of the two portions he had bought from Periathamby Chettiar, to Lim and Goy and on 3th April, 1962, Lim and Goy sold the 36 relongs to the third defendant who then entered into occupation.

All this while the second agreement of sale between the plaintiff and Periathamby Chettiar (exhibit P - 5) was still in force. Under it Periathamby Chettiar had to complete on or before 3rd September, 1962, but on that date again he failed to make the final payment.

The plaintiff's solicitors moved fast. On that very day they filed this writ against the three defendants complaining that they were trespassers and on the following day they issued a notice to Periathamby Chettiar (exhibit P - 7 is a copy) formally rescinding the agreement and forfeiting the deposit.

But as it appears from the evidence, by then the bird had flown and Periathamby Chettiar, whose name was on everybody's lips throughout these proceedings, is now safely ensconced in his native land quietly and peacefully enjoying the fruits of his labours. The first defendant has paid him $241,500 and the second defendant $156,750 only to find themselves involved in this worrying litigation.

Such are the preliminary facts in so far as fraud is concerned but there are other facts equally relevant and I shall in a moment refer to them. But first I must state the law of fraud as it appears to me from the authorities.

That law is well settled and for the purpose of this case I do not think I need refer to more than one case, a House of Lords decision, *Bradford Building Society* v. *Borders*.[1] The principle established by it is conveniently summarised by Viscount Maugham at page 211 as follows:—

> "....[the] common law of deceit....requires four things to be established. First, there must be a representation of fact made by words, or, it may be by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand mere silence, however morally wrong, will not support an action of deceit....Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true....Thirdly, it must be made with the intention that it should be acted upon by the plaintiff....in the manner which resulted in damage to him....If, however fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made....Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing...."

The evidence regarding the four ingredients which require to be established by the first and second defendants if they are to succeed in proving fraud by the plaintiff is conflicting but having heard it and observed the witnesses' demeanour under very expert cross-examination and having considered the documentary evidence my findings are as follows.

As regards the first ingredient, namely that there must be a representation, usually by the defendant but here by the plaintiff who is the party complained of, I find that in fact there was a representation by the plaintiff to the first two defendants here at the estate on 9th and 12th September 1961 and it was to this effect that the plaintiff had sold the estate to Periathamby Chettiar, he had given Periathamby Chettiar the right to sub-divide and sell and that the first two defendants were to deal with Periathamby Chettiar. I reject the plaintiff's denial on this point.

As regards the second ingredient, namely that the representation must be made with a knowledge that it is false, it must be wilfully false, or at least made in the absence of any genuine belief that it is true, I find that the plaintiff's representation was not false, on the contrary it was true, but probably it was misleading to the first two defendants at the time it was made because they were not versed in the ways of fragmenting estates. But I do not believe that the plaintiff meant to mislead them.

As regards the third ingredient, namely that the representation must be made by the plaintiff with the intention that it should be acted upon by the first two defendants in the manner which resulted in damage to him, I find that the plaintiff intended that the first two defendants should deal with Periathamby Chettiar if they wished to buy portions of the estate.

As regards the fourth ingredient, namely that the first two defendants must prove that they acted upon the plaintiff's false statement and have sustained damage by so doing, as already stated I find that the plaintiff's representation was not false but true but probably it was misleading to the two defendants when it was made, but on the question whether it was this representation that solely or partly induced them to deal with Periathamby Chettiar, all the evidence leading to their firm decision to buy, must be considered as a whole.

This evidence it is convenient to divide into three stages as follows. The first stage consists of the background of the first two defendants, the second consists of the evidence of what happened on the estate when they visited it on the 9th and 12th September, 1961, and the third consists of the evidence of what happened in the offices of the first two defendants' solicitors, Mr. Hwang and Periathamby Chettiar's solicitor Mr. Yeo on 13th and 14th September, 1961.

First, as to the background of the first two defendants, they may be illiterate in Malay and English but they are not ignorant kampong rustics. The first defendant is a dried fish dealer in Alor Star. That he is a man of some substance is shown by the fact that it did not strain him unduly to have to find $241,500 to pay Periathamby Chettiar (indeed even as early as on 14th September, 1961, he was in a position to give his solicitor Mr. Hwang a cheque for $102,450, i.e. only two days after he had agreed the area and price with Periathamby Chettiar) and was willing and ready to pay the balance of the purchase price ($100,000) to any person in a position to give him title. The second defendant is a rice miller, the sole proprietor of the Seng Keng Rice Mill, and the Chartered Bank was willing to allow him a running overdraft of $800,000.

They say themselves, see their pleadings, that in or about September 1961 they were interested in the purchase of portions of Tupah Estate.

As we have already heard, on 3rd September, 1961, Periathamby Chettiar formally agreed to buy the estate from the plaintiff, the transaction to be completed within six months. Periathamby Chettiar told Teh Ah Seng, D.W.11, that he had bought the estate and asked Teh to find and recommend buyers. On the evidence I believe Teh to have been Periathamby Chettiar's broker, Teh told Tan Teng Yew, D.W.10, about it in Jitra town, saying that the Chettiar wanted to subdivide and sell. Teh had known Tan Teng Yew some 20 years. Tan Teng Yew told the first defendant on 6th September, 1961.

On 8th September, 1961, Teh Ah Seng told the second defendant whom he had known for ten to fifteen years, saying that a Chettiar had bought Tupah Estate, he wanted to sub-divide and sell and asking if he knew of any one interested in buying.

At this stage before they had met the plaintiff, both the first and second defendants knew that Periathamby Chettiar had bought the estate and wanted to fragment it and to show how eager they were to buy, on the following day (and here we come to the second stage) they turned up on the estate to have a look at it. It was on this occasion (the 9th) that they met the plaintiff for the first time, at the estate, and the plaintiff made to them the representation complained of. He repeated it again three days later in the presence of Periathamby Chettiar himself, when the first two defendants returned to the estate on the 12th. The first two defendants discussed terms with Periathamby Chettiar and eventually they agreed the prices and the respective portions they were to buy. The first defendant agreed to pay $341,500 for his portion and the factory etc., while the second defendant agreed to pay $99,250 for his. The first defendant and Periathamby Chettiar and likewise the second defendant and Periathamby Chettiar agreed that an agreement of sale be made between them at D.W.5 Mr. Hwang's office in Alor Star. Later the same day they appeared at Mr. Hwang's office. Mr. Hwang is a solicitor residing and practising in Penang but practising also in Alor Star. As it was late, Mr. Hwang had gone back to Penang and his Alor Star office had closed. Both the first and second defendants accompanied Periathamby Chettiar to a house in Alor Star where the second defendant paid Periathamby Chettiar a deposit of $5,000. I am of the opinion that at this stage no firm and binding agreement had been entered into between Periathamby Chettiar and the first defendant nor between Periathamby Chettiar and the second defendant.

So much for the second stage.

Now we come to the third stage. It is important to scrutinise what happened in the presence of the lawyers when the agreements of sales were discussed and eventually agreed between Periathamby Chettiar and each of the two defendants, in order to determine whether the plaintiff's representation had any effect on the two defendants' mind when they entered into these fateful agreements which eventually resulted in their parting with large sums of money to Periathamby Chettiar.

On the 13th Periathamby Chettiar and the first two defendants with some others reappeared in Mr. Hwang's office. Mr. Hwang was acting for the first two defendants. They told him that they wanted to buy portions of Tupah Estate from Periathamby Chettiar, they did not tell him on this occasion (nor on the next day) that the plaintiff had told each of them that he had sold the estate to Periathamby Chettiar, that he had given Periathamby Chettiar the right to sub-divide and sell and that they were to deal with Periathamby Chettiar. This in my view has an important bearing on the question whether the plaintiff's representation had anything to do with their final decision to buy from Periathamby Chettiar.

The particulars of the properties to be bought by his clients were not made available to Mr. Hwang, he was told that Mr. Yeo Ah Seng, a solicitor practising in Ipoh, was Periathamby Chettiar's solicitor and he advised his clients that they should go and see Mr. Yeo. They asked Mr. Hwang to go to Ipoh with them and he agreed. They went the same day.

In Mr. Yeo's office the next day (the 14th) there were present, apart from Mr. Yeo and Mr. Hwang, the first two defendants, Periathamby Chettiar and Teh Ah Seng. The particulars of the properties were made available but the two agreements of sale, exhibit D-17, (between Periathamby Chettiar and the first defendant), and exhibit D-20, (between Periathamby Chettiar and the second defendant), were not settled and signed until after a protracted discussion which lasted, apart from a lunch break, from about 10 in the morning until about five or six in the evening. This shows that the verbal agreement made by Periathamby Chettiar on the one hand and by each of the first two defendants on the other at the estate on the 12th was not a firm agreement. During the discussion in Mr. Yeo's office, the agreement of sale dated 2nd September, 1961, between the plaintiff and Periathamby Chettiar (exhibit "A" page 7) was made available to Mr. Hwang who read it and indeed the recital of D.17 and D.20 makes references to it. So I do not think that the first two defendants can now be heard to say that they were not aware of the true nature of the transaction between Periathamby Chettiar and the plaintiff, for Mr. Hwang's knowledge is their knowledge and clause 2 of that agreement clearly says that the balance of the purchase price payable under that agreement for the purchase of Tupah Estate by Periathamby Chettiar from the plaintiff, over $1 million, was payable within six months of its date 2nd September, 1961, and clause 6 says that Periathamby Chettiar or his nominees were to get registrable transfers from the plaintiff only upon completion and payment of the balance within the stipulated time and the agreement also says (again clause 2) that time shall be of the essence. No matter what the first two defendants think about these terms, at any rate it was clear to Mr. Hwang that Periathamby Chettiar could obtain title to the estate and was therefore in a position to honour his obligations to his sub-purchasers if and only if he had completed under his agreement with the plaintiff by paying him the full purchase price by a stipulated date.

Aware of the dangers to his clients of the proposed purchases, Mr. Hwang warned them, saying that if Periathamby Chettiar walked off with the money or became insolvent "they would have had it", Mr. Hwang tried to persuade Mr. Yeo to agree to act as a stake-holder of the purchase money which would not be paid over by Mr. Yeo to Periathamby Chettiar until a registrable transfer had been executed by Periathamby Chettiar in favour of the first two defendants, Mr. Yeo consulted Periathamby Chettiar who refused and insisted that some payments should be made then and there and that others should be as in the agreements D.17 and D.20, to be paid over to him by Mr. Yeo without waiting for the execution of a registrable transfer by him (Periathamby Chettiar) in favour of the first two defendants.

The risks involved must have made some impression on the minds of the first two defendants for at some stage of the discussion it was necessary for some one or other to lead them out of Mr. Yeo's room in order to show them a receipt signed by Periathamby Chettiar, hanging under a glass frame outside Mr. Yeo's room showing that Periathamby Chettiar had in one transaction paid $6,500,000 to an European company from whom he had bought a group of estates for fragmentation. Mr. Yeo gave his opinion as to Periathamby Chettiar's integrity and in the end the first two defendants despite their solicitor's advice, signed the two agreements D.17 and D.20, which Mr. Hwang refused to attest as a sign of disapproval.

I do not say that Mr. Yeo gave them a personal assurance that the transaction would be completed by Periathamby Chettiar to the satisfaction of the first two defendants — it is un-

necessary for me to make a finding on this, as Mr. Yeo is not on trial before me — but I do say that the first two defendants relied to a great extent on Periathamby Chettiar's good record in the past as represented to them by Mr. Yeo and Mr. Hwang certainly thought that Mr. Yeo had personally guaranteed the transactions. Throughout the discussion there was no suggestion by anybody that Periathamby Chettiar was selling as the plaintiff's agent, as is alleged in the pleadings, and indeed this allegation was dropped during the course of the trial.

Consideration of the third stage, i.e. the events in Mr. Hwang's office in Alor Star on 13th September, 1961, and in Mr. Yeo's office in Ipoh on the following day led me to believe that the first two defendants would have bought from Periathamby Chettiar in any event, even if the plaintiff had made no representations to them.

As to payment by the first two defendants to Periathamby Chettiar under the two agreements, the first defendant had on 13th September, 1961, paid Mr. Hwang in Alor Star $102,450. On the 14th in Mr. Yeo's office, Mr. Hwang gave a cheque for that amount to Mr. Yeo. On 2nd December, 1961, the first defendant gave a cheque for $139,000 to Mr. Hwang. Mr. Hwang paid this over to Mr. Yeo. On 13th February, 1962, the first defendant wanted to pay Mr. Hwang the balance of $100,000, but Mr. Yeo advised the withholding of this final payment and in fact to this day it has never been made. As to the second defendant, he had, as already observed, paid Periathamby Chettiar a deposit of $5,000 on the 12th in Alor Star. On the 14th in Mr. Yeo's office he paid $74,250, leaving a balance of $20,000 which he paid direct to Periathamby Chettiar on 12th February, 1962, in the Chartered Bank, Butterworth. It was on this occasion that Teh Ah Seng received $5,000 from Periathamby Chettiar apparently by way of commission.

Mr. Hwang who has had considerable experience in fragmentation of estates, thought that Periathamby Chettiar's prices were reasonable and if the first two defendants had refused to buy, Periathamby Chettiar could easily have found other buyers. The second defendant must also have thought Periathamby Chettiar's prices reasonable, for on 29th October, 1961, and 3rd November, 1961, he acquired other portions the subject of the agreement D.21 dated 2nd December, 1961, for $57,500 which he has paid. These portions include an area of 36 relongs on which stands a clerk's house which he bought for $37,000. Later he sold this (less the house worth about $4,000) for $37,000 to Lim and Goy who as already stated resold it to the third defendant.

The money which the first and second defendants paid to their solicitor Mr. Hwang was paid over to Periathamby Chettiar's solicitor Mr. Yeo who paid it over to Periathamby Chettiar. The second defendant has paid in full. The first defendant has paid all but $100,000.

In the course of the trial counsel for the first and second defendants admits that his clients have had notice of the first agreement of sale dated 2nd September, 1961 between the plaintiff and Periathamby Chettiar, but he says that clause 4 thereof provides that Periathamby Chettiar, his servants or his nominees shall be entitled to enter into possession of the estate as from 2nd September, 1961, and shall be entitled to tap all the rubber trees and make any survey or prospect the said land for any minerals. This, it is submitted, confers very wide powers on Periathamby Chettiar. In fact Mr. Hwang was himself quite surprised by its scope, in view of the small amount of deposit ($25,000) paid by Periathamby Chettiar on such a large transaction (the full purchase price was $1,150.000) and when he raised the point he was told by Mr. Yeo that in fact the deposit paid was $125,000 but it had been expressed as $25,000 "for income tax purposes." It is said that it was under this clause that on the 14th after the two agreements D.17 and D.20 had been signed, Periathamby Chettiar gave in Mr. Yeo's office the first defendant a letter as at exhibit "A" page 15 addressed to "the Manager, Tupah Estate" asking him to allow the first defendant to enter into the portions which he had bought, and the second defendant a similar letter. On the very next day (the 15th) the second defendant went to the estate and showed it to Ang Lay Hay, P.W.4, (clearly Periathamby Chettiar's manager) who allowed him to enter and tap. The first defendant did not do so until the 30th when he also was allowed to enter and tap.

Then, it is submitted, the plaintiff went and made the supplementary agreement P.3 dated 23rd September, 1961, which, it is said, completely altered the position. It is not disputed that only one copy was executed of this agreement, that this was done after the first and second defendants had entered into their agreements (D.17 and D.20) on the 14th with Periathamby Chettiar and that the copy (of P - 3) was taken away by the plaintiff and that its terms were never communicated to the first two defendants nor to their solicitor Mr. Hwang.

I am of the opinion that P - 3 did not alter the position in the way suggested by the first two defendants. They told their solicitor Mr. Hwang on the 13th in Alor Star that they wanted to buy portions of the estate from Periathamby Chettiar. On the 14th in Mr. Yeo's office in Ipoh Mr. Hwang was shown the agreement of 2nd September, 1961, between the plaintiff and

Periathamby Chettiar (exhibit "A" page 7). Mr. Hwang knew then that Periathamby Chettiar was buying from the plaintiff and that Periathamby Chettiar had to pay the plaintiff the full purchase price within six months and he would get good title only then. Mr. Hwang knew then that in the meanwhile Periathamby Chettiar for his part had the right to sub-divide and sell by agreements of sale entered into with his sub-purchasers, that indeed was the usual way in which fragmenters of estates find the money to pay the principal vendor and make a profit for himself. Mr. Hwang knew then that time was of the essence and if Periathamby Chettiar failed to complete, the plaintiff could forfeit the deposit and rescind the agreement. He must have known then that in that event the right to enter given under clause 4 to Periathamby Chettiar, his servants and nominees would have been worthless, for it could have been terminated. In my view this was so even without clause 5 of the supplementary agreement. In my view the most important effect of that agreement was to provide for payment of $9,000 per month by Periathamby Chettiar for the right to enter and tap. Even looking at the agreement of 2nd September, 1961, alone in Mr. Yeo's office on 14th September, 1961, Mr. Hwang was so apprehensive that he suggested though in vain that Mr. Yeo should act as a stake-holder.

Consideration of the following also fortifies me in my view that the plaintiff's representation had nothing to do with the first two defendants' act in buying their portions from Periathamby Chettiar.

Under his agreement D.17 with Periathamby Chettiar, the first defendant had to make his final payment ($100,000) to Periathamby Chettiar on 28th February, 1962, whereupon Periathamby Chettiar was to give him a valid registrable transfer. The first defendant was willing and ready to do so, so his solicitor wrote the letter dated 13th February, 1962, (exhibit "A" page 39), but nothing happened and, worried, his solicitor wrote the letter dated 28th February, 1962, and all he got was a reply from Periathamby Chettiar's solicitor (Mr. Yeo), (exhibit "A" page 32), saying that the first defendant should retain the $100,000 until further instructions. He waited until July.

Nor did the second defendant obtain a valid registrable transfer from Periathamby Chettiar though he had paid in full.

Some time in July 1962 their solicitor Mr. Hwang rang up Mr. Yeo in Ipoh and on the following day (the 4th) a meeting was held in Mr. Yeo's office in Ipoh at which were present, apart from Mr. Yeo and Mr. Hwang, the first two defendants and Teh Ah Seng who were later joined by the plaintiff's brother P.W.6. It was a stormy meeting, for by then it must have been clear to everybody that Periathamby Chettiar was no longer in the country, the first two defendants who together had parted with nearly $400,000 wanted their lands but the plaintiff's brother (who seemed to have been in control) was unwilling to let them have the lands unless they were willing to pay him 80% of what was still due to him from Periathamby Chettiar. Mr. Yeo suggested that the plaintiff's brother should only accept 60%, he (Mr. Yeo) contributing 10% and the two defendants 50%. This was turned down by the plaintiff's brother and by the two defendants. At this meeting Mr. Yeo was in great distress (Periathamby Chettiar's disappearance cost him $350,000) and said that if he had the money he would have made good the losses suffered by the two defendants. In the end no compromise was reached.

On the 12th Mr. Hwang on instructions wrote to Mr. Yeo the letter (exhibit "A" page 54) demanding that Mr. Yeo should personally refund the first defendant's loss.

It is in my view significant that at this meeting there was no suggestion by anybody that the plaintiff had in any way cheated the first two defendants and that Periathamby Chettiar's name was uppermost in everybody's mind and on everybody's lips.

So my conclusion on the issue of fraud is that no such thing has been practised by the plaintiff on the first and second defendants.

Before I leave this subject, I would like to observe that I believe that the plaintiff's brother Kee Huat was the prime mover in these transactions, he financed the plaintiff's deal with Gooi Bros., he knew that Periathamby Chettiar who later bought from the plaintiff intended to fragment for a profit, he knew there were sub-purchasers, he kept an eye on the progress of Periathamby Chettiar's activities, but he kept in the background not because of any sinister motive against the unfortunate defendants but probably for reasons connected with the revenue. I believe that he would have made enough profit if Periathamby Chettiar had succeeded in his scheme, which if undesirable from the social point of view (fragmentation results in the displacement of old established labour and the discontinuance of health and other services) is perfectly legitimate and honest and I believe that neither he nor the plaintiff (who must also have known of the existence of sub-purchasers) had any desire or intention to cause the first two defendants or any person any loss.

[His Lordship then summarised his finding as to the amount of money spent by the first two defendants, and continued:]

As to trespass, the acts complained of by the plaintiff were committed from 7th July, 1962.

This writ was issued on 3rd September, 1962.

The date 7th July, 1962, was specified presumably because when Periathamby Chettiar's cheque for $9,000 had bounced the plaintiff sent him a letter bearing that date (exhibit "A" page 52) giving him notice that as he had failed to pay the monthly sum of $9,000 for June and July 1962 under the tapping agreement (exhibit P - 6) his licence to enter and tap had ceased and determined in accordance with its clause 4 and that he and his tappers and labourers should leave on or before 10th July, 1962. The three defendants themselves were not written to until 11th July, 1962, (exhibit "A" page 53).

The estate consists of separate lots each with a document of title. We are concerned only with the lots specified in the statement of claim, twelve in number. As regards nine of them, they were at the time of the issue of the writ (3rd September, 1962), and are still today registered in the plaintiff's name, having been so registered between 12th and 26th September, 1961, according to an agreed statement handed to me at the beginning of the trial. These nine lots are numbered 21, 24, 707, 708, 878, 1038, 1039, 1582 and 1913.

As to the other three lots numbered 1098, 2531 and 2533, until today they have not been registered in the plaintiff's name. Lot 1098 was formerly lot 11. Lots 2531 and 2533 were formerly part of lot 1914. This lot (1914) was owned by seven registered co-proprietors including the plaintiff's brother P.W.6. There was a partition agreement between the co-proprietors under which the lot was to be sub-divided into several lots including lots 2531 and 2533 which were to go to P.W.6. Accordingly the title of the original lot (1914) was sent to the Land Office in exchange for the issue of new titles. These three lots were included in the property sold by Gooi Bros. to Tan Thean Tow and by the latter to the plaintiff. On 13th September, 1962, Tan Thean Tow executed a declaration of trust in the plaintiff's favour in respect thereof, vide exhibit P - 2. When new titles have been issued these three lots would be transferred to the plaintiff. Indeed as to lot 1098, a registrable transfer was executed in the plaintiff's favour in the week before the first day's hearing and has been sent to the Land Office for registration.

It is necessary to set out my findings as to the exact position relating to these twelve lots because the three defendants say this, that as regards the three lots of which the plaintiff has never been and is not today the registered proprietor, because the plaintiff can adduce no title superior to the defendants in respect of such portions of the aforesaid lots as the defendants occupy, the plaintiff therefore has no cause of action in respect thereof at the time of the issue of the writ and has no right to any relief asked for in respect thereof. Counsel for the defendants refers to various sections of the Kedah Land Code including sections 43 and 78.

Much interesting argument was addressed to the court by both sides on this point but I regret that I do not find myself able to agree with Mr. Rintoul, for, as I understand it, trespass is an injury to a possessory right and therefore it is enough if the plaintiff in an action of trespass to land is the person who was, or who is deemed to have been, in possession at the time of the trespass. The type of conduct necessary to evidence possession varies with the type of land; and to maintain an action against a person who never had any title to the land the slightest amount of possession is sufficient. Where possession is doubtful, or equivocal, the law attaches it to the title. For these propositions of law, see *Halsbury's* Law of England, vol. 38, para 1214 and the cases therein cited.

Here the plaintiff, having been passed by Tan Thean Tow the benefit of his agreement with Gooi Bros., took possession of the estate from Gooi Bros. and thereafter lived in the manager's bungalow, employing a manager Ah Tan to look after and work the estate. From then on until this dispute with the three defendants he did not always remain on the estate. He left it occasionally but whenever he returned he always stayed in the estate bungalow. The plaintiff was also frequently in the area in connection with some mining activities that were going on. I do not think that on these facts it can be seriously contended that the plaintiff was not in possession of this estate. Indeed the defendants were at pains to establish that.

Periathamby Chettiar's right to enter and tap, first under the first agreement of 2nd September, 1961, clarified by the supplementary agreement of 25th September, 1961, and later under the second agreement of sale P.5 and under the tapping agreement P.6, was in my view a mere licence terminable in certain circumstances by the plaintiff. When Periathamby Chettiar failed to pay the June and July 1963 licence fee, this licence was lawfully terminated by the plaintiff but only with effect from 10th July, 1962. To remove any doubt in the matter, when Periathamby Chettiar failed to find the balance purchase price by the date stipulated in the second agreement of sale and when the plaintiff formally wrote forfeiting Periathamby Chettiar's deposit and rescinding the agreement, whatever semblance of right the three defendants had to remain on the estate (after all they had derived their rights only from Periathamby Chettiar) disappeared altogether.

Such being my view of the facts and the law on the issue of trespass, I hereby enter judgment for the plaintiff in respect of the three lots of which the plaintiff was not the registered proprietor at the time of the issue of the writ.

Likewise there shall be judgment in favour of the plaintiff in trespass in respect of the nine lots of which the plaintiff was the registered proprietor at the time of the issue of the writ.

The first defendant is guilty of trespass only in respect of the properties described in the schedule to the agreement (exhibit D.17) marked red in the plan annexed to that agreement and is so guilty from 11th July, 1962.

The second defendant is guilty of trespass only in respect of the properties the subject matter of exhibits D.20 and D.21 less that portion sold by him to Lim and Goy who later sold the same to the third defendant and is so guilty from 11th July, 1962.

The third defendant is guilty of trespass only in respect of the properties the subject of the agreement (exhibit "A" page 46) and is so guilty from 11th July, 1962.

In each of the three cases I say that the defendants are guilty only with effect from 11th July, 1962, not 7th July, 1962, the date specified in the pleadings, because the letter (exhibit "A" page 52) sent to Periathamby Chettiar by the plaintiff asked that Periathamby Chettiar, his tappers, labourers and workmen should leave on or before 10th July, 1962. And they are so guilty only until the date they vacated the properties in pursuance of the interlocutory injunction issued before the hearing.

In consequence of my judgment there shall be an order in terms of the plaintiff's prayer (i). As regards prayers (ii) and (iii) there shall be an enquiry to be held by the Assistant Registrar of this court as to damages and accounts.

As regards costs, the plaintiff's claim is allowed with costs and the defendants' counterclaims are dismissed with costs. Taxed party and party costs on higher scale, to be paid by defendants to plaintiff, one order of costs jointly and severally against all three defendants. Certificate for two counsel.

Judgment for the plaintiff.

Solicitors: *Presgrave & Matthews*; *Jayadeva & Zahir.*

RE THE PEACE INSURANCE CO. LTD.

[O.C.J. (Ong J.) February 12, 1964]

[K.L. — Companies Winding-Up No. 10 of 1962]

Company Law — Insurance Company — Loan by directors to themselves — Sale of shares by former directors to new directors — Purchase price of shares paid out of assets of company — Whether both sets of directors old and new liable — Companies Ordinance, 1940-1946, s. 137(1).

Life Assurance Companies (Compulsory Liquidation) Act 1962.

The Peace Insurance Co. Ltd. was on March 13, 1962 compulsorily wound up under the Life Assurance Companies (Compulsory Liquidation) Act 1962.

On September 27, 1961 Foo Ah Soo and two others (hereinafter called the new directors) bought the entire share issue of the company for $744,000 from Hor Hoi Thin and eight others (hereinafter called the former directors). Payment was by deposit of $80,000 and balance of $664,000 to be paid when transfer to new directors made. Of the said sum, $547,253.56 came out of the funds of the company in a bank.

On November 8, 1962 the liquidator applied by summons in chambers for a declaration that the new directors were guilty of misfeasance and breach of trust as directors by applying the sum of $547,253.56 of the company's moneys to their own use. By a further summons the liquidator applied for a declaration that the nine former directors and each of them was guilty of misfeasance and breach of trust by (a) authorising and/or procuring a loan of $40,000 to themselves contrary to section 137 of the Companies Ordinance and (b) procuring or permitting to be paid to themselves for the sale of the shares in the said company for $744,000 out of funds belonging to the company.

The nine former directors admitted receiving $744,000 but said $80,000 and a further $116,746.44 had been paid by the purchasers with their own money and denied that they had any knowledge that the company's moneys had been used to pay them the purchase money or that they knew or consented to such course of action. A loan of $20,000 was admitted.

The applications were consolidated and heard together.

Held: (1) it was conclusively proved that the former directors agreed to place company's funds at the disposal of the new directors;

(2) it was no defence for the new directors to say they were not even members of the company when they drew on the company's account as directors;

(3) all directors former and new were guilty of misfeasance and breach of trust and must pay the company $744,000 with interest thereon at 6% per annum;

(4) the $80,000 paid to Foo Ah Soo one of new directors in form of deposits paid in advance by persons who were to be appointed agents of the company after its takeover and paid to former directors was money had and received by Foo Ah Soo for the use of the company and Foo Ah Soo had misapplied it;

(5) in making loans to themselves to the total of $37,500 the old directors were in contravention of section 137(1) of the Companies Ordinance.

Cases referred to:—

(1) *Coventry & Dixon's case* (1880), 14 Ch. D. 660, 670.

(2) *Re Sale of Hotel & Botanical Gardens Ltd.; ex parte Hesketh* (1898), 78 L.T. 386, 370.